SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 686

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

LOUISE F. McPHERSON, ADMINISTRATRIX OF THE ESTATE OF JASON B. McPHERSON, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SPRINGFIELD, MISSOURI COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

THOMAS J. COLE,
DEWITT C. CHASTAIN,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

TABLE OF STATUTES CITED.

APPENDIX.

SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SPRINGFIELD, MISSOURI COURT OF APPEALS.

The petitioner, Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, respectfully shows to the Court:

A.

Summary Statement of the Matter Involved.

The action, a review of which is sought, is one for wrongful death of an employee of a common carrier while engaged in interstate commerce, and was based on the Federal Employers' Liability Act (Title 45, Section 51, U. S. C. A.).

The petitioner is the Trustee of the Missouri Pacific Railroad Company, duly appointed pursuant to Section 77 of the

Act of Congress relating to Bankruptcy, and was operating the railroad at the time of the injuries which resulted in the death of Jason B. McPherson, a section foreman. Judgment in the sum of Five Thousand Dollars was rendered in favor of the administratrix for the benefit of the widow and a minor child, by the Circuit Court of Barton County, Missouri in the September, 1941 term thereof, and this judgment was affirmed by the Springfield Court of Appeals.

The facts as found by the Court of Appeals in its opinion (R. 74) are that:

Jason B. McPherson, a section foreman for the defendant, was killed on January 30, 1940 when the motorized handcar on which he was riding, and of which he was in charge, collided with a truck at the intersection of the railroad track which runs north and south, and an east and west public highway south of Independence, known as 39th Street.

On this day the deceased had joined crews with that of section foreman Hanes and gone on the deceased's motorized handcar south of Independence where the two crews engaged the day in cutting weeds and cleaning up the right-of-way. The deceased was in charge of the combined gangs, and was the superior of everyone in them, including foreman Hanes, and had supervision over and control of the motor car on which the section men were riding. When the day's work was done, the men boarded the motor car and started north to Independence. There were five men on the motor car which was operated by Ted Strohm who sat on the left or west side about the middle of the car. The car had a hand brake and a hand throttle. On the same side and back of Strohm sat Mr. McFarland. On the right or east side were three men; the deceased McPherson, the foreman, sat at the front in a slanting position and had hold of the rail at the front end of the motor car. He could see west, north

and east. South of him and facing east were Mr. Hanes and another section man; there was no one on the front end of the west or left side of the motor car. As the foreman in charge of the gang it was the deceased's duty to ride in this position where he could observe and control the movements of the motor car. As the motor car approached 39th Street it slowed its speed down to about four miles per hour, and when within six or eight feet of the crossing, which was a plank crossing 24 feet long north and south, the deceased McPherson signalled to operator Strohm to come on and go across the crossing, and the motor car came on over the crossing, and near the north end thereof collided with a truck which was traveling eastwardly on 39th Street, derailing the motor car and killing Mr. McPherson. Just before the motor car started over the crossing the deceased Mcpherson had looked to the west and to the east and had motioned to Strohm to come on across. It was the deceased McPherson's duty when he arrived at the crossing to signal the operator of the motor car whether or not he should go on across. It was a cloudy day but there was no mist or fog, but there was snow and ice on the pavement, and the truck approached from the west on the icy, black top pavement, slightly downgrade, at a speed variously estimated at from 15 to 45 miles per hour. When the truck was about 100 feet from the railroad track the driver of the truck applied the brakes which caused it to sway and skid, and the driver to lose control of it. The truck got down almost to the railroad track when it turned to the north and ran along the crossing the same direction the motor car was going, then cut over in front of the motor car at the north side of the crossing, and caused the collision. There was no evidence as to whether Strohm, the operator of the motor car, saw the approaching truck or not, nor whether he did anything, but the motor car did not change its speed very much. The motor car

could have been stopped by use of the brake within a distance of six to ten feet.

The truck driver, McClenagan, a witness for the plaintiff, stated he approached the crossing at a speed of 15 miles per hour, and that the motor car was 25 feet south of the crossing when he first saw it from a distance of 100 feet west of the track. Other witnesses for the plaintiff said the truck was going from 35 to 45 miles an hour, and that the motor car was half way over the crossing when they first saw the truck about 100 feet to the west, and at that time the truck driver applied his brakes. Both Mr. McFarland and Mr. Hanes were called as witnesses by the plaintiff and they, with the truck driver, were the only witnesses who testified concerning the accident. The defendant offered no evidence, and stood upon the plaintiff's case.

In addition to the above facts, plaintiff's witness, Hanes (R. 25), testified it was McPherson's duty to see that the highway was clear and that he could get across it before he permitted the operator of the motor car to start across; that in the position in which the deceased sat he had the most advantageous position to see if there was anything on the highway to interfere, and (R. 25) testified it was his (McPherson's) motor car and he was in charge of it, and everybody on it was required to do what he said. It was his duty to keep a vigilant lookout at highway crossings for vehicular traffic or any kind of traffic, and both of said witnesses (McFarland (R. 20) and Hanes (R. 26)) testified that when the truck driver put on the brakes and started swaying, you could not tell whether he was going to hit the motor car or get off in front of it, and that the driver of the motor car wouldn't know whether to stop and let the truck get ahead of him, or try to get ahead of it. The truck driver, McClenagan, testified (R. 28) that he turned his truck to the north to keep from having a collision and that he thought that by so doing it would give the motor car time to go by.

Verdict and judgment for Five Thousand Dollars against the petitioner were rendered on September 17, 1941 (R. 10), and an appeal was duly taken to the Springfield Court of Appeals (R. 11) where the judgment of the lower court was affirmed by said appellate court on July 27, 1942 (R. 73). Timely motions for rehearing and for a modification of the opinion filed in the Springfield Court of Appeals on August 1, 1942, were overruled on August 24, 1942 (R. 80), and thereafter a timely application for a writ of certiorari to review the action of the Springfield Court of Appeals was made to the Supreme Court of Missouri on September 17, 1942 (R. 81), and the Supreme Court of Missouri denied said petition for certiorari on November 12, 1942 (R. 101), and stay of mandate was duly granted (R. 103).

B.

Basis for Jurisdiction.

The judgment of the Springfield Court of Appeals of Missouri determined rights claimed under the Federal Employers' Liability Act. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stats. 937 (U. S. Code Annot., Title 28, Section 344, Paragraph b).

C.

Questions Presented.

1. Whether the evidence is sufficient in kind or amount to show negligence on the part of the petitioner.

2. Whether the Springfield Court of Appeals has sustained a verdict based upon speculation and conjecture.

3. Whether the Springfield Court of Appeals has failed to accept the interpretation of this Court as to the basis of liability under the Federal Employers' Liability Act.

4. Whether recovery can be had for the death of the deceased foreman, McPherson, for the alleged negligence of an employee who acted under the express orders and was under the absolute control of said deceased.

D.

Reasons Relied Upon for the Allowance of the Writ.

The questions presented arise under the Federal Employers' Liability Act (45 U. S. C. A. Section 51) and are federal questions. Under the Act recovery cannot be had except for negligence, and on certiorari this Court will examine the record and determine if the evidence is sufficient in kind and amount as a matter of law to show negligence and to determine whether the case rests on negligence or upon speculation and conjecture.

The Springfield Court of Appeals has failed to accept the interpretation of this Court as to when liability arises under said Act, and has failed to consider and follow the decisions of this Court in *Davis* v. *Kennedy,* 266 U. S. 147; *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, and like decisions, and the decision of the Springfield Court of Appeals is not in accord with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued by this Court, directed to the Springfield Court of Appeals of the State of Missouri, commanding that Court to certify and send to this Court a complete transcript of the record and proceedings in the case of Louise F. McPherson, Administratrix of the Estate of Jason B. McPherson, deceased, *v.* Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, No. 6354; and that said cause be reviewed and determined by this Court; and that the finding and judgment of said Springfield Court of

Appeals be reversed by this Honorable Court; and that your petitioner have such other and further relief as to this Honorable Court seems proper.

GUY A. THOMPSON, Trustee of the
MISSOURI PACIFIC RAILROAD COMPANY,
By THOMAS J. COLE,
DEWITT C. CHASTAIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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LOUISE F. McPHERSON, ADMINISTRATRIX OF THE ESTATE OF JASON B. McPHERSON, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Springfield Court of Appeals has not been officially reported. The cause is therein titled "Louise *F. McPherson, Administratrix of the Estate of Jason B. McPherson, deceased, respondent,* v. *Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, appellant, No.* 6354", and is reported in 164 S. W. 2d 80.

II.

Statement as to Jurisdiction.

The petitioner, in support of the jurisdiction of this Court, to review the above cause on writ of certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon Section 237, Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 344), which provides as far as here pertinent as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority, and with like effect as is brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a State in which a decision could be had * * * where any title, right, privilege or unity, specially set up or claimed by either party under * * * any statute of * * * the United States."

Title 28, Section 350, U. S. Code, provided as far as pertinent:

> "Sec. 350. Time for Making Application for Writ of Error, Appeal, or Certiorari; Stay Pending Application for Certiorari.—No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

B.

Date of Judgment of State Court.

The judgment sought to be reviewed was rendered on July 27, 1942 (R. 73). The petitioner herein filed a motion for rehearing and a motion to modify the opinion in the cause in which the judgment was rendered on August 1, 1942, which was within the ten day period prescribed by Rule 23 of the Springfield Court of Appeals for filing such motions. Said motions were overruled on August 24, 1942 (R. 80), and on September 17, 1942, the petitioner herein applied to the Supreme Court of Missouri for a writ of certiorari to review the judgment of the Springfield Court of Appeals in said cause. The said application for certiorari to the Supreme Court was within the thirty-day period prescribed by the Supreme Court practice (*State ex rel. Berkshire* v. *Ellison,* 287 Mo. 654). The Supreme Court of Missouri en banc denied the said application for certiorari on November 12, 1942 (R. 101), and the judgment of the Springfield Court of Appeals thereby became final.

The three-month period for making this application starts to run with the date of the refusal of the Missouri Supreme Court to review the judgment of the Court of Appeals (*American Ry. Exchange Co.* v. *Levee,* 263 U. S. 19).

The Springfield Court of Appeals is a court of final jurisdiction where the amount involved does not exceed $7,500.00 (Sec. 2078, R. S. Mo. 1939). Said court was created by an Act of the Legislature of Missouri, being Section 2071, R. S. Mo. 1939, pursuant to Section 3 of the Amendment of 1884 of the Constitution of Missouri. By Section 8 of the Amendment to the Missouri Constitution of 1884, supra, it is provided:

> "The Supreme Court shall have superintending control over the Courts of Appeals by mandamus, prohibition and certiorari."

So that by the refusal of the Supreme Court of Missouri to review the decision and opinion of the Springfield Court of Appeals in said case, that decision became a final judgment of the highest court of the State in which a decision could be had (*Mitchell* v. *Joplin National Bank*, 231 S. W. 903, not officially reported; and *First National Bank, etc.* v. *Missouri Gas Company*, 243 Mo. 409) within the provision of the Federal Statute hereinbefore quoted.

The Court has expressly so held in the case of *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, and has reviewed the judgments of the Springfield Court of Appeals in other cases, examples of which are *Duncan* v. *Thompson, Trustee*, 315 U. S. 1, 62 S. Ct. 422.

C.

Nature of Case and Ruling Below.

This was a suit for wrongful death under the Federal Employers' Liability Act. The deceased was the foreman of the section crew, riding at the front of a motorized handcar, and in complete control of it, and the car was struck by a truck at a public highway crossing. Before entering onto the crossing the deceased had looked in all directions and had signalled the operator of the motor car to proceed across the highway. The petition charged several grounds of negligence (R. 3) but the sole charge of negligence therein which was submitted to the jury under plaintiff's Instruction No. 1 (R. 55) was negligence of the operator of the motor car, Strohm, in failing to stop the motor car before colliding with the truck after he saw or could have seen the truck approaching the crossing, slipping and sliding, and out of the driver's control. The Court of Appeals in its opinion declined to notice or consider the decisions of this Court (of which *Unadilla Valley Ry. Co.* v. *Caldine* is an example) which involved similar facts, and

held that the driver, Strohm, was negligent in failing to stop although he had been ordered to cross the highway by the deceased (R. 78), and although two witnesses, who were the only ones who testified on the point, said that the driver of the motor car could not tell whether to attempt to stop or to attempt to cross in front of the sliding truck. The petitioner contended in the courts below that the evidence did not show any negligence on his part, and that the verdict rested upon speculation and conjecture, and that under the decisions of this Court the finding of negligence under the Federal Employers' Liability Act had to take into account the relation between the parties, and that the deceased McPherson was chargeable with the alleged negligence of the driver Strohm. These contentions were denied by the Court of Appeals. The Court of Appeals failed to consider or accept the interpretation of the Federal Employers' Liability Act made by this Court in the following cases:

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91;

Frese v. *C., B. & Q. Ry. Co.,* 263 U. S. 1, 44 S. Ct. 1;

Davis v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33;

St. Louis S. W. Ry. Co. v. *Simpson,* 286 U. S. 346, 52 S. Ct. 520;

Great Northern Ry. Co. v. *Wiles, Admr.,* 240 U. S. 444, 36 S. Ct. 406.

It failed to consider the decisions of this Court that recovery under the Act may not rest upon speculation and conjecture.

Penn. R. Co. v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391;

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;

So. R. Co. v. *Walters,* 284 U. S. 190, 52 S. Ct. 58;

N. Y. Central R. Co. v. *Ambrose,* 280 U. S. 486, 50 S. Ct. 198;
Patton v. *T. & P. Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275;
C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564.

D.

Cases Believed to Sustain Jurisdiction.

In actions under the Federal Employers' Liability Act this Court will examine the record and reverse the judgment if the evidence is insufficient in kind or amount as a matter of law to show negligence.

C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564;
Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;
Atlantic Coast Line R. Co. v. *Davis,* 279 U. S. 34, 49 S. Ct. 210;
Atlantic Coast Line R. Co. v. *Driggers,* 279 U. S. 787, 49 S. Ct. 490;
So. Ry. Co. v. *Moore,* 284 U. S. 581, 52 S. Ct. 38;

and will examine the record and reverse where a case rests upon speculation and conjecture,

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151;
Patton v. *T. & P. Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275;
C., M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564.

Likewise, where a court fails to accept the interpretation of this Court of the Federal Employers' Liability Act, this Court will review the action and apply the proper remedy.

C. & O. Ry. Co. v. *Kuhn,* 284 U. S. 44, 52 S. Ct. 45.

III.

Statement of the Case.

The facts on which the Springfield Court of Appeals relied are set out under heading "A" in the petition for writ of certiorari, and in the interest of brevity the statement is not repeated.

IV.

Specification of Errors.

1. The said Court erred in failing to hold that under the record the deceased McPherson was primarily responsible for the crossing of the highway in safety and was the alter ego of the petitioner, and that the negligent acts, if any, of the driver of the motor car were in law the acts of the deceased.

2. The Springfield Court of Appeals erred in holding that there was evidence of negligence on the part of the defendant.

3. Said Court erred in failing to find that under the record the verdict was based upon speculation and conjecture.

V.

ARGUMENT.

Summary of the Argument.

1. The opinion does not follow the decisions of this Court on the question of negligence under the Federal Employers' Liability Act.

2. Under the record there was no proof of negligence on the part of the defendant.

3. The opinion below is based upon speculation and conjecture.

ARGUMENT.

A.

This Court has held that it will review the decision of a state court which fails to accept its interpretation of the Federal Employers Liability Act, and apply the proper remedy. (*C. & O. Ry. Co.* v. *Kuhn, supra.*)

The Springfield Court of Appeals has failed to follow this Court's construction of the Act in determining the question of negligence and has overlooked the relationship between the parties. It was the duty of the deceased McPherson, according to the lower Court's opinion, to ride the front of the motor car where he could observe the movements of the motor car (R. 75), but the opinion does not fully state the duty, as shown by the record. All of the evidence offered in the case was offered by the plaintiff and plaintiff's witness, Hanes, testified (R. 25) that it was McPherson's duty as foreman "to see that the highway was clear and that you could get across it before he permitted the operator of the motor car to start across it. In the position that he sat he had the most advantageous position to see whether there was anything on the highway that interfered." And again (R. 26) Mr. Hanes testified that "it was his motor car and he was in charge of it and everybody on it was required to do what he said. It was his duty to keep a vigilant lookout at highway crossings for vehicular traffic or any kind of traffic." Hanes was himself a foreman but on this day was working on the section crew under McPherson. The opinion of the court below finds that the motor car approached the highway crossing at a speed of about 4 miles an hour and that when within 6 or 8 feet of the crossing the deceased McPherson signaled

to the driver of the motor car to come on and go across the crossing and that just before the motor car started over the crossing the deceased McPherson had looked to the West and then to the East and had then motioned Strohm, the operator, to come on across, and it was the deceased McPherson's duty when he came to this crossing to signal the operator whether or not he should go on across. The Court of Appeals, notwithstanding the positive testimony of every witness who testified about the duty, said that because Strohm, the driver of the motor car, would have to perform the mechanics of applying the brakes, the deceased McPherson was not in the absolute control of the motor car. The opinion in this respect clearly fails to follow this Court's decision in *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139. That was an action under the Federal Act by the administrator of a deceased conductor who was killed when his train collided with another train. The conductor had orders to take a siding to allow another train to pass but after reaching the siding, and instead of waiting as his orders required him to do, he directed the train to go on. It was claimed that as the motorman knew the other train was on the way, the motorman should have refused to obey the conductor and that his act in physically starting the car was more immediately connected with the collision than the order of the deceased. That is the same position taken by the Court of Appeals but this Court expressly disallowed such a contention and held that the railroad was not liable, and used this language:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the Railroad Company that employed him to

> say that the collision was due to any one but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

In the case of *Frese* v. *C., B. & Q. Ry. Co.*, 263 U. S. 1, the action was under the Federal Employers Liability Act for the death of an engineer caused by a collision in Illinois between trains. The statute in Illinois required the engineer to ascertain that the way was clear and that a train could safely cross. The Missouri Supreme Court held that since the engine was under the control of the engineer who was killed that there could be no recovery, and this Court affirmed. Answering the contention that there was negligence of a subordinate who could have averted the injury, this Court said:

> "Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, Ch. 149, Sec. 3, 35 Stat. 65, 66 (Comp. St., Sec. 8659)) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more. See Great Northern Ry Co. *v.* Wiles, 240 U. S. 444, 448, 36 S. Ct. 406, 60 L. Ed. 732. If the engineer could not have recovered for an injury his administratrix cannot recover for his death."

There can be no difference in principle between the violation of a statute by an employee and the violation of the

positive duty of the deceased employee to see that the highway was clear before entering upon it. If the driver Strohm could have done anything to have averted the collision, then it is certain that the deceased, his superior, could have ordered the same action on his part.

In *Davis* v. *Kennedy*, 266 U. S. 147, the deceased was an engineer on a train and was killed in a collision with another train. The other train had the right of way and the crew had instructions never to pass a certain station unless they knew as a fact that the other train had passed it. The engineer ran his train beyond the stop and the collision occurred. It was contended that there was negligence of other employees in failing to maintain a lookout, just as the Court of Appeals held there was negligence on the part of Strohm. But this Court rejected that contention and used this language:

> "The trial was in a Court of the State of Tennessee, and the plaintiff got a judgment which was sustained by the Supreme Court of the State on the ground that the other members of the crew as well as the engineer were bound to look out for the approaching train and that their negligence contributed as a proximate cause to the engineer's death. We are of the opinion that this was error. It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. *Frese* v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1, 3, 44 S. Ct. 1, 68 L. Ed. 131."

In *St. Louis Southwestern Ry Co.* v. *Simpson*, 286 U. S. 346, the action was by the administrator of the estate of an

employee to recover damages for wrongful death under the Federal Act. The deceased was the engineer. He had received a written order to proceed to a certain crossover and wait until another train arrived. He did not wait but moved on to the main line and the collision occurred. It was claimed that recovery could be had under the last chance doctrine due to the fact that the brakeman had remembered the orders and had called out to apply the air brakes but the conductor refused to permit this to be done until he looked over the orders and while he was reading them the collision occurred. This Court said that the facts so summarized were insufficient to relieve the engineer from the sole responsibility of the casualty which resulted in his death.

In *Great Northern Ry. Co.* v. *Wiles, Administrator,* 240 U. S. 441, the action was under the Federal Act and brought by the administrator of the deceased brakeman. The train had broken in two on a sharp curve and at that time the deceased was in the caboose. It was his duty to have then gone back to protect the rear end of the train, that is, he should have gone back and flagged the passenger train, which he failed to do, and the passenger train ran into the caboose and caused his death. This Court held that his disregard of duty prevented a recovery.

The Springfield Court of Appeals gave no consideration to these cases although they were called to its attention in petitioner's brief and in his motion for rehearing. These decisions show that the opinion of that Court is wrong in failing to hold that the deceased's own act was the cause of his death. Deceased had a positive and primary duty to control the movement of the motor car at and over the crossing and, as stated in the Davis case, it would be a perversion of the Federal Employers' Liability statute to allow a recovery for an injury directly due to his failure to act, on

the ground that it might have been prevented if those in secondary relation to the movement had done more.

The situation in this record fits the holding in the Caldine case exactly. The deceased was the alter ego of the petitioner. He was in command. He was obeyed, and he ought not to be heard to say that his subordinate, the driver of the motor car, ought not to have done what he ordered.

B.

It is likewise established by the decisions of this Court in *C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, and many other decisions hereinbefore cited, that the Court will examine the record to determine whether the evidence is sufficient in kind or amount as a matter of law to show negligence. The sole ground of negligence submitted was the failure of the driver, Strohm, to stop the motor car before colliding with the truck (R. 56). The record shows that just before starting over the crossing the deceased had looked both to the West and to the East and had motioned the driver of the motor car to come on across (R. 75), and that the deceased was in the best position to see the highway and it was his duty to see that the crossing could be safely crossed. Now, it could not be negligence for the driver of the car to proceed over the highway crossing as directed so to do by his superior, and while his superior remained in a position where he could best see the highway's condition. For aught it appears that the deceased was alert and saw the approaching truck and concluded that the way to avoid a collision was for the motor car to move ahead. There could be no negligence on the part of the driver Strohm in obeying the orders of his superior and no duty can be said to rest upon Strohm to act independently of the deceased, his superior, in the very presence of his superior.

C.

Furthermore, both section foreman Hanes (R. 25) and witness McFarland (R. 20), both experienced railroad men, testified that if the truck had come on the right hand side of the highway without the brakes being applied, the motor car would have had plenty of time to have crossed in front of it, and each testified that from the time that the truck was 100 feet from the crossing, which is the point where the driver of the truck said he applied his brakes and it began to skid, you couldn't tell whether the truck was going to hit the motor car or get off in front of it, and that the driver of the motor car wouldn't have known what to do; that he couldn't tell whether to go ahead or try to stop, and the witness McClenagan, the driver of the truck, testified (R. 28) that when his car began to slip he headed it to the North, and that he thought if he turned to the North he would give the motor car time to go by.

This testimony was not considered by the Court of Appeals, but it shows, as we think, that even if there had been any duty on Strohm to maintain a lookout at the highway crossing, it could not be said that he was negligent in failing to apply the brakes; apparently the safest course was to attempt to get on in front of the truck.

And it is not enough that a case rests on speculation and conjecture. *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455, and cases hereinbefore cited. The record shows that the verdict rests upon speculation. There was no evidence as to whether the driver Strohm saw the aproaching truck or not, nor whether he did anything, but it was shown that the motor car didn't change its speed very much and that it could have been stopped by the use of the brakes within a distance of 6 to 10 feet. But the record does not show that if the motor car had been stopped it would have averted the collision. It is purely a matter of guess work as to

whether the collision would have been averted if the driver Strohm had applied the brakes, so the whole case rests upon conjecture and speculation.

WHEREFORE, it is respectfully submitted that the petition herein prayed for should be granted and that a writ of certiorari should be granted and that this Court review the decision of the Springfield Court of Appeals in said cause.

THOMAS J. COLE,
DEWITT C. CHASTAIN,
Counsel for Petitioner.

APPENDIX.

Sec. 2071, R. S. Mo. 1339.

"There is hereby established at Springfield, Missouri, an appellate court to be known as the Springfield Court of Appeals, the jurisdiction of which shall be co-extensive with the Counties of * * * Barton * * *."

Sec. 2078, R. S. Mo. 1939.

"The various courts of appeal of Missouri shall have jurisdiction of appeals and writs of error in all cases where the amount in dispute, exclusive of costs, shall not exceed the sum of $7,500.00."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 686.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a corporation,

Petitioner,

vs.

LOUISE F. McPHERSON, Administratrix of the Estate of JASON B. McPHERSON, Deceased.

BRIEF OF RESPONDENT LOUISE F. McPHERSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SPRINGFIELD, MISSOURI COURT OF APPEALS.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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I.

Jurisdiction.

It is the contention of respondent that there is no question of substance presented for review by petitioner; that there is nothing before this Court except the sufficiency of evidence to establish negligence on the part of petitioner and that the Court should decline to review said decision.

II.

Respondent's Statement.

This is an action under the Federal Employers' Liability Act for damages for the wrongful death of Jason B. McPherson, respondent's husband. There was a judgment for five thousand dollars ($5,000.00) affirmed by Springfield Court of Appeals, State of Missouri. Petition for writ of certiorari to Supreme Court of Missouri denied.

The deceased was employed by the petitioner as a section foreman. With a crew of four men he was returning home after the day's work. They were riding on a gasoline motorized hand-car (hereafter referred to as motor car) driven by Ted Strohm, petitioner's employee, who had been operating the car for many years [R. 16-17-18]. The car is about six feet long [Ex. E]. The operator sits near the middle of the car on the left side. There is a footboard along each side of the car. The employees sit sidewise of the car with their feet on this footboard; the body, unless turned, is at right angles to the direction the car moves [Exs. E and F]. At the time of deceased's injury and death the car was moving north. At a point where it crosses 39th street, the track runs north and south. Thirty-ninth street is a paved public highway, descends a few degrees down a hill from the west to the railroad track, and runs east and west [R. 15].

The highway was covered with ice and snow. The deceased sat at the northeast corner of the car; behind him were Haines and Shoemaker. McFarland, another employee, sat on the west side of the car just behind Strohm [R. 15-16].

North of the highway the track makes a wide turn to the east [R. 37, Ex. B]. It was the deceased's duty to watch for oncoming trains around this curve, for broken rails and ties and for the approach of vehicles on the highway [R. 24]. It was the duty of each employee to keep a lookout for vehicular traffic on the highway. The deceased sat two or three feet forward from Strohm. The motor car had been running ten or twelve miles an hour, slowed down to three or four miles an hour about 50 feet south of the highway [R. 15-16]. The crossing at the highway was 24 feet wide, the highway 18 feet wide. From a point 26 feet south of the south edge of the highway the men on the motor car had an unobstructed view for 137 feet up the hill to the west [Ex. D, R. 41]. From 18 to 20 feet south of the crossing there was an unobstructed view to the top of the hill which was about 400 feet.

For the deceased to observe a vehicle on the highway approaching the railroad track from the west it was necessary for him to make a complete turn.

Plaintiff called as witnesses; Haines and McFarland, both section foremen in the employ of the defendant at the time of trial. McFarland testified that as they approached the highway although facing the west, instead of looking to the west for traffic from that direction he looked towards the east and continued to look east until the motor car, traveling only three or four miles an hour, had reached the middle of the crossing when he first looked towards the west and saw a large truck approaching 100 feet away, traveling 40 or 45 miles an hour [R. 16-17]. He said when they reached a point 10 feet south of the highway he could have looked to the west and seen

the truck coming three or four hundred feet away [R. 18]. He testified when he first saw the truck:

"It was slipping and sliding on the pavement."

When the motor car reached a point about six or eight feet south of the south edge of the highway crossing, the deceased gave Strohm a signal to come ahead. When the motor car reached the middle of the highway about 20 feet beyond where the come ahead signal was given, McFarland first saw the truck 100 feet up the hill. Since the truck was traveling 15 times as fast as the motor car it is manifest that the truck was over the hill and not in sight when the deceased ordered Strohm to proceed.

The truck driver testified the truck was traveling 15 miles per hour. If that were true the truck was approximately 200 feet up the hill when the order was given to come on across. Ordinarily it would be perfectly safe to cross in front of a vehicle 200 feet away traveling 15 miles per hour.

But after the order to proceed was given Strohm instead of whipping up and moving on, continued the pace of three to four miles per hour all the way across the highway, 24 feet, and to a point 30 feet beyond. When the truck ran to a point near the tracks, it turned and proceeded northward parallel with the tracks for thirty feet until it came to a shoulder and had to cross the tracks [R. 28]. It was not until then that the motor car ran into the side of the truck.

The operator of the truck testified [R. 27-28]:

"When I first saw this car coming I tried to stop. I put on the brakes * * *. My truck begun weaving from side to side on the ice and I came right on down there until I got pretty close to the tracks

> * * * and I took right down the railroad track going north the same way the motor car was going. I crossed the tracks down there about 30 feet north of the crossing * * * as my truck crossed the track we had a collision. * * * When I came north I came up to that shoulder, I had to go across the tracks. As I turned to go across the tracks that is when the collision happened. My front wheels had already crossed, the rear wheels were not yet across."

He testified that the motor car struck the truck at the right-hand door, back of the front right fender, and under the grain bed [R. 28].

The evidence disclosed that the motor car could have been stopped any time in from six to eight feet.

Petitioner did not call Strohm the driver. With reference to Strohm's duty Haines testified [R. 24]:

> "Mr. Strohm was operating the car and it was his duty to watch and stop in case of emergency. He should watch for trains and traffic and any thing that was on the tracks, the traffic on the highway and the trains also. It was his *duty* to stop if he saw *danger* regardless of what Mr. McPherson might have *motioned* or *said* or *done.*"

The petition charged, 1st, that the operator of the motor car negligently failed to stop the motor car before colliding with the truck after he saw or could have seen the truck approaching the crossing slipping and sliding and out of the driver's control; and 2nd, that the driver of the motor car negligently drove the motor car across the path of the truck while the latter was so close that it created an imminent danger of collision therewith. And plaintiff's instruction (1) submitted both of those issues [R. 55-56].

III.

ARGUMENT.

Summary of the Argument.

1. There is no question of substance submitted for review.
2. The opinion does follow the decision of this Court of questions of negligence under the Federal Employer's Liability Act.
3. There is strong and convincing evidence that defendant was negligent and that deceased was free from negligence.
4. The opinion is not based on speculation and conjecture.

A.

As foreman of the section crew it was the duty of deceased to ride at the right front end of the motor car to watch for trains, inspect the track, watch for vehicular traffic at public crossings, and to signal the operator of the motor car whether or not he should go on across. While it was the duty of Strohm to obey the signals of his foreman, it was likewise his duty to look out for trains, traffic on the highway, and to stop if he saw danger regardless of what his foreman might have ordered or directed [R. 24]. The deceased did not have absolute control of the motor car as stated by the Springfield Court of Appeals. He could not put on the brakes or manipulate the machinery so as to go forward. That duty fell to Strohm.

It was the duty of deceased to give signals and orders and to exercise ordinary care in so doing, it then became

the duty of Strohm to execute those orders with the same degree of care.

If the deceased was guilty of primary negligence in giving an order or signal which proximately resulted in his death it is elementary law that his representative could not recover damages for such negligent act. This is the gist of the cases relied on by petitioner, which we shall notice more in detail presently. In all of those cases it was admitted that the primary negligence of the injured or deceased was the proximate cause of the resulting tragedy. And in none of the cases was the Last Clear Chance Doctrine applicable or involved.

In the case here the overwhelming evidence and physical facts demonstrate that the deceased was not guilty of any negligence at all; the jury so found, and the judgment was approved by the Appellate Courts.

It is readily apparent that when the deceased gave the signal to go ahead the truck was nowhere in sight or was so far away that it was perfectly safe for the motor car to proceed across the highway. When the signal was given the motor car was eight feet south of the crossing; the motor car traveled three to four miles per hour; when it reached the middle of the highway, which is 24 feet wide, and had gone 20 feet, the truck was 100 feet away. If the truck was going 45 miles an hour before the brakes were applied it was running three times as fast as the motor car. While the motor car traversed that 20 feet the truck traveled 300 feet; it was therefore 400 feet away when the signal was given. If so it was not in sight. Was the deceased guilty of primary negligence in giving a signal under those circumstances? Manifestly not. The truck driver said he was traveling

15 miles an hour. If so he traveled five times as fast as the motor car and he was 200 feet away when the signal was given. Is it negligent to pass in front of a slow moving vehicle when it is 200 feet away? Certainly not.

Manifestly when the brakes were applied the speed of the truck was cut down so that the truck would travel the last 150 feet in approximately the same time the motor car would run 42 feet to the point of collision.

The physical facts support the contention of the truck driver that after almost reaching the track he turned north and ran 30 feet parallel with the track.

When deceased gave the signal to come on he had a right to assume his order would be obeyed; that the motor car would promptly speed up to twelve miles and cross the highway. He was not negligent in making such assumption and therefore, not required to look again for oncoming vehicles. To a man of ordinary prudence the way was clear. At any rate failure to look again would amount to nothing more than contribtory negligence and that is not a defense in cases under the act.

Rocco v. Lehigh Valley Ry. Co., 288 U. S. 275.

The Springfield Court of Appeals was correct when it said the deceased did not have absolute control of the motor car. After he signaled come ahead, he had done all it was physically possible for him to do. Thereafter the operation of the car was in the hands of Strohm and he failed to operate it with due care. Had he carried out the order of his foreman, the collision would have been averted.

Petitioner's Cases.

In *Unadilla Valley Ry. Co. v. Caldine,* 278 U. S. 139, Caldine the conductor negligently failed to obey an order to stop his train and lost his life. Primary negligence. Obviously he could not recover.

In *Freze v. C. B. Q.,* 263 U. S. 1., the Court held Freze could not recover because he negligently failed to ascertain whether the other train had passed. He could not pass this responsibility to a subordinate.

Davis v. Kennedy, 266 U. S. 147, is not in point. There Kennedy, the engineer, failed to look for a train and was killed. The Court correctly held his representative could not recover on the ground that some inferior servant might have prevented his death.

St. Louis S. W. Ry. Co. v. Simpson, 286 U. S. 346, is not applicable. There Simpson negligently violated a written order to wait for another train.

Nor does *Great Northern Railway Co. v. Wiles,* 240 U. S. 441, help petitioner, because the Court held that Wiles primary negligence was the sole and proximate cause of his death.

None of the above cases help the petitioner under the facts as they appear from the record in this case. That is why the Springfield Court of Appeals failed to consider them.

The more recent case of *Rocco v. Lehigh Valley Ry. Co., supra,* is more closely in point with the case at bar. That case considers and comments on all of the above cases cited by petitioner and distinquishes them from *Rocco* as well as from the case here. It says, "In each of them the decedent's negligence was the proximate and efficient cause of the accident."

The case at bar is stronger even than *Rocco* because it was admitted that Rocco was guilty of contributory negligence.

The Supreme Court of Missouri in *Good v. M. K. T. Ry. Co.*, 97 S. W. (2d) 617, clearly distinguishes the case cited by petitioner from the case at bar. It says:

> "In Unadilla Val. Ry. Co. v. Caldine, 278 U. S. 139; Frese Admin. v. C. B. Q. R. Co., 263 U. S. 1; Davis v. Kennedy Admin., 266 U S 147 and Great Northern Ry. Co. v. Wiles, 240 U. S. 444, the negligence of the deceased, in violation of some personal duty imposed by rule of defendant company or by statute designed for the protection of himself and others in the situation confronting him, was considered the primary cause of the events directly resulting in his death, unaccompanied by the negligence of another or others directly contributing to the resulting events and consequences thereof and chargeable to the defendant."

In other words in those cases the deceased violated some personal duty imposed by rule for his protection. What duty did deceased violate here? None. It was his duty to look and signal at crossings, which he fully performed.

Petitioner assumes a position contrary to the facts as shown by the record. It begins with the false premise, that deceased negligently ordered Strohm to proceed across the highway in the face of imminent danger and that it was Strohm's duty to obey; that he did so and as direct result of his own carelessness he lost his life. This position is contrary to the physical facts and not supported by the evidence. None of the witnesses testified as to where the truck was when the signal was given; the physi-

cal facts demonstrate it was so far away that it was not negligent to cross at the time and place, if the motor car had been operated in the usual and customary manner and with ordinary care. The proximate cause of the tragedy in the first analysis was the failure of Strohm to put on the gas and go ahead; in the second place his failure to stop after the truck driver turned up the track and was exerting every reasonable effort to avoid a collision.

The case of *Illinois Central Ry. Co. v. Skaggs,* 240 U. S. 66, is in point. Skaggs, a head brakeman, gave the engineer a signal to back up; got on the tender of the engine and while looking back for a signal was crushed between the tender and a standing car at a switch. The company contended Skaggs was injured solely as a result of his own negligence; Skaggs testified the rear brakeman told him the clearance was sufficient and he relied on that statement. In affirming a judgment for Skaggs this Court said:

> "It may be taken for granted that the Statute does not contemplate a recovery by an employee for the consequences of action exclusively his own * * * but on the other hand it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused his injury * * *. If the injury resulted in 'whole or in part' from the negligence of any of the other employees, it is liable under the express terms of the Act."

See, also:

Norfolk & Western v. Earnest, 229 U. S. 114.

Last Clear Chance.

Again, the petitioner's driver, Strohm, had the last clear chance to stop and thereby save the life of decedent after he had negligently failed to obey the order of deceased to proceed ahead promptly. Strohm saw or should have seen the truck. The presumption is that he did see it. He was not called as a witness but had he appeared, he could not have denied these facts; the truck was huge. [See Ex. G, R. 47]; It was broad daylight; it approached full in his face; it turned and ran along beside the track for 30 feet; it ran side by side for some distance with the motor car; it passed it; Strohm could not be heard to say he did not see this truck any more than a traveler on the highway could deny that he saw an unobstructed railroad track or a train in front of him. When he saw the truck approaching he should have speeded up and gone by, but failing to do that, he should have stopped when the truck started north and was in the clear.

Haines and McFarland gave as their conclusions that had the truck gone straight ahead it would have passed behind the motor car. It may have done so. But the gross negligence of Strohm in loitering along, caused the truck driver, in an effort to avert the collision, to turn up the track. Had Strohm speeded up clearly the truck could and would have gone across behind him. After it turned to the north it ran across half the width of the highway and 30 feet further before it was compelled to turn and cross the tracks. Strohm could have stopped at any time in from six to eight feet and avoided the collision; and during all of that time the deceased was helplessly in the hands of Strohm. Even if deceased had been negligent in giving the signal which he was not, yet that

negligence, if any, would have become the remote cause and the subsequent negligence of Strohm, the proximate cause of his death. That fact distinguishes this case from those cited by petitioner, *viz., Caldine, Freze, Kennedy et al.*

See:

Armstrong v. Mobile and Ohio R. R. Co., 55 S. W. (2d) 465 (Mo. Sup.); certiorari denied 289 U. S. 743-753, 77 L. Ed. 149;

Jenkins v. Wabash Ry. Co., 107 S. W. (2d) 204 (Mo. App.); certiorari denied 302 U. S. 737.

The Opinion Is Not Based on Speculation or Conjecture.

The negligence of Strohm in failing to proceed promptly is not a matter of speculation or conjecture. It is admitted by all of the witnesses in the case that the motor car ran from three to four miles per hour and never changed its speed. That was a proximate cause of the collision. It was not a matter of conjecture as to whether or not Strohm could stop the motor car in six to eight feet. That likewise was admitted. It was clearly a question for the jury as to whether Strohm could and should have stopped the motor car and avoided the collision during the time the truck was running parallel with the track. That was likewise a proximate cause of the collision. For a moment while the truck was slipping and sliding toward the track, Strohm may have been in doubt whether to stop or speed up, but after the truck made the turn to the north and while it was running along by the side of the motor car, and passed same, which the physical facts demonstrate it did, the motor car should have been stopped,

and Strohm was clearly guilty of negligence in not then and there doing so. At least this was an issue for the jury.

In *Choctaw, Okahoma & Gulf R. R. Co. v. McDade,* 191 U. S. 64, this Court affirmed the judgment which defendant contended was based on speculation and conjecture. A water spout extended over a railroad track about the height of a man's head. McDade was last seen on top of a furniture car. His body was found 675 feet beyond the water spout. He had bruises on his head. The Court said:

> "It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration."

Myers v. Pittsburg Coal Company, 233 U. S. 184, is in point. Myers lost his life in a coal mine. Defendant contended the judgment was based on speculation and conjecture. This Court said:

> "We think the jury might well have found in view of the place at which the body of Myers was found, near to the wire, with his cap gone from his head that he came in contact with that wire and was thrown to the ground, and that he survived from the contact with the wire, carrying the voltage which it did and while in this situation was run over and killed by the approaching motor car."

In *Union Pacific R. R. v. Huxoll,* 245 U. S. 535, a railroad employee was knocked down and run over by a locomotive. The engineer did not see him or know that he had been struck but received a wash out signal to stop.

He could have done so in 15 or 16 feet but ran 100 feet or more. It took an hour to release Huxoll during which time he died. This Court held that it was a jury issue as to whether or not the deceased's life might have been saved had the locomotive been stopped promptly.

Manifestly the verdict in this case was not based on speculation and conjecture.

We respectfully submit that the petition to the Springfield Court of Appeal of the State of Missouri for a writ of certiorari should be denied.

Very respectfully submitted,

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